

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON - SEATTLE

RICHARD O. BUSE,

Plaintiff,

vs.

FIRST AMERICAN TITLE INSURANCE
COMPANY; FORCLOSURELINK, INC.;
GREENPOINT MORTGAGE FUNDING
INC.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
RESCOMM HOLDINGS NO. 2, LLC; UM
ACQUISITIONS, LLC; TOM BLOCK; and
Doe Defendants 1 through 20,,

Defendants.

Case No. C-08-0510-MJP

DEFENDANTS' FIRST AMERICAN
TITLE INSURANCE COMPANY AND
FORECLOSURELINK, INC.'S MOTION
FOR SUMMARY JUDGMENT, OR
ALTERNATIVELY, FOR SUMMARY
ADJUDICATION

NOTE ON MOTION CALENDAR
April 24, 2009

Defendants First American Title Insurance Company ("First American") and Foreclosurelink, Inc. ("Foreclosurelink"), submit the following Motion for Summary Judgment, or Alternatively, for Summary Adjudication of Cause of Action. This Motion is based upon the following memorandum of points and authorities, the Affidavit of First American, the Affidavit of Foreclosurelink, the Affidavit of Peter J. Salmon, the Request for Judicial Notice, and such other and further evidence that the Court will consider.

I. SUMMARY OF THE ARGUMENT

First American and Foreclosurelink are entitled to summary judgment or summary adjudication on the causes of action asserted against them. Although the Plaintiff asserts separate causes of action against them for Infliction of Emotional Distress, Slander of Title, Breach of

1 Fiduciary Duty, Violation of the Consumer Protection Act, and for Injunctive Relief, his claim rests
2 entirely upon the assertion that First American and Foreclosurelink violate Title 61 of the Revised
3 Code of Washington (RCW) through the scope of the agency between First American as the
4 foreclosure trustee and Foreclosurelink as its agent. This assertion is premised upon a citation to a
5 Washington statute that is not even in effect and overlooks the provisions of Title 61 of the RCW
6 explicitly and implicitly allowing the use of agents, as well as case law addressing the issue.

7 Specifically, First American and Foreclosurelink have submitted affidavits which set forth
8 the licensing status of First American, its conduct as a nonjudicial foreclosure trustee, the form of
9 nonjudicial foreclosure notices, the duties performed by Foreclosurelink, and the limited nature of
10 the agency as limited to specific foreclosure in which the assistance of Foreclosurelink is sought by
11 First American. In addition, RCW 61.24.010(4) specifically permits the use of agents to conduct
12 auctions, provides for the trustee to utilize services of others to publish and mail notices, and does
13 not in any way prohibit the use of an agent by a trustee. The facts and arguments set forth in section
14 IV. infra demonstrate that Plaintiff's theory is fundamentally flawed.

15 The Plaintiff's failed theory permeates throughout his causes of action, none of which he can
16 establish as a matter of law against either First American or Foreclosurelink. The first cause of
17 action for Infliction of Emotional Distress fails because the Plaintiff cannot establish any of the
18 elements of the tort as required by Washington law, particularly because a plaintiff must establish
19 that the conduct at issue must be "so outrageous in character, and so extreme in degree, as to go
20 beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a
21 civilized community." Grimsby v. Samson, 85 Wash.2d 52, 59-60 (1975). The second cause of
22 action for Slander of Title fails because the Plaintiff admitted he defaulted in payments under the
23 Deed of Trust under which First American was the trustee, and cannot establish malice in the
24 recording and delivery of nonjudicial foreclosure notices.

25 The third cause of action for Breach of Fiduciary Duty fails to create a disputed issue of
26 material fact because the Plaintiff cannot show that First American or Foreclosurelink failed to
27 deliver nonjudicial foreclosure notices as required by Washington law or that they engaged in any
28 conduct that caused the Plaintiff to believe that nonjudicial foreclosure would not proceed. The

1 fourth cause of action for Violation of the Consumer Protection Act fails as a matter of law because
2 the Plaintiff cannot establish either first or fourth element of the claim. Specifically, Plaintiff cannot
3 show that under RCW 19.86.020, First American or Foreclosurelink engaged in an unfair or
4 deceptive act or practice, or that it proximately caused injury to the plaintiff in his or her business
5 or property. Johnson v. Cash Store, 116 Wash.App. 833, 846 (Wash.App.2003).

6 Finally, Plaintiff's separate cause of action for an injunction to stop the foreclosure that
7 Defendant Block was pursuing through First American is moot, as Plaintiff has reached a settlement
8 with Mr. Block by which he admitted the default and agreed to terms of repayment. In conjunction
9 with that settlement, First American caused the recording of a Notice of Discontinuance of Trustee's
10 Sale. As a result, there exists no pending foreclosure process for the Plaintiff to enjoin, making the
11 relief sought by this cause of action moot.

12 **II. UNDISPUTED MATERIAL FACTS**

13 First American is licensed by the State of Washington as a title insurance company, WAOIC
14 number 461. First American has been admitted as a title insurance company in the State of
15 Washington since January 2, 1969. (Affidavit of First American, ¶ 6). First American maintains an
16 office located at 2101 4th Avenue, Suite 800, Seattle, WA 98121, at which personal service can be
17 made upon it, and has maintained that office address at all times relevant to this litigation. (First
18 Am. Aff., ¶ 7).

19 First American serves as a nonjudicial foreclosure trustee under certain deeds of trust
20 encumbering real property located in the State of Washington. First American is familiar with the
21 requirements of Washington law with regard to the conduct of nonjudicial foreclosures, and has
22 verified that the form of its nonjudicial foreclosure notices complies with Washington law.
23 Specifically, First American has verified that the form of its Notice of Default, Notice of
24 Foreclosure, and Notice of Trustee's Sale comply with the Revised Code of Washington sections
25 61.24.030 and 61.24.040. (First Am. Aff., ¶ 8).

26 In connection with acting as a nonjudicial foreclosure trustee, First American also will
27 prepare a trustee's sale guarantee that identifies the current property owner, existing encumbrances,
28 address of persons or entities entitled to notice of the nonjudicial foreclosure sale, and identifies

1 matters that may constitute exceptions to the foreclosing beneficiary obtaining title to real property
2 free and clear of claims or encumbrances upon completion of a nonjudicial foreclosure sale. The
3 trustee's sale guarantee does not equate to an owner or lender's policy of title insurance, but provides
4 certain guarantees in connection with the processing of a nonjudicial foreclosure. (First Am. Aff.,
5 ¶ 9).

6 First American has contracted with Foreclosurelink, Inc., to act as an agent of First American
7 for purposes of: preparing the appointment of successor trustee to cause First American to become
8 the trustee; preparing nonjudicial foreclosure notices; causing notices to be mailed to parties required
9 to receive notice; coordinating the posting and publishing of the Notice of Trustee's Sale; and,
10 arranging for an auctioneer to conduct the actual nonjudicial foreclosure sale. The form of the
11 Appointment of Successor Trustee, Notice of Default, Notice of Foreclosure, Notice to Guarantor,
12 and Notice of Trustee's Sale actually generated for any nonjudicial foreclosure sale comes from a
13 format approved of by First American in order to comply with Washington law. The identity of and
14 addresses for persons or entities to be served with nonjudicial foreclosure notices contained within
15 the Notice of Default, Notice of Foreclosure, and Notice of Trustee's Sale comes from the trustee's
16 sale guarantee generated by First American, as well as from information provided by the beneficiary
17 or servicer of the loan for the foreclosing beneficiary. (First Am. Aff., ¶ 10; Affidavit of
18 Foreclosurelink, ¶ 7.)

19 Foreclosurelink only serves as an agent for First American when specifically agreed upon for
20 specific nonjudicial foreclosures of real property. Foreclosurelink does not have authority from First
21 American to serve as the agent for First American for purposes of a nonjudicial foreclosure without
22 the prior written consent of First American, and is authorized to sign documents only as the agent
23 of First American. Unless specifically agreed upon in writing for a limited purpose, Foreclosurelink
24 does not have a power of attorney to execute documents on behalf of First American in connection
25 with any nonjudicial foreclosure sale. (First Am. Aff., ¶ 11, Foreclosurelink Aff., ¶ 8).

26 Foreclosurelink was the agent for First American Title Insurance Company ("First
27 American"), the substituted trustee under the below-referenced Deed of Trust, for purposes of
28 assisting in the delivery of non-judicial foreclosure notices concerning the non-judicial foreclosure

1 of a Home Equity Line of Credit Deed of Trust and Security Agreement ("Deed of Trust") dated June
2 9, 2004, encumbering the real property commonly known as 31210 Carnation Duvall Road
3 Northeast, Carnation, Washington 98014, aka 9424 Carnation Duvall Road Northeast, Carnation,
4 Washington 98014 ("Subject Property"). (First Am. Aff., ¶ 12, Foreclosurelink Aff., ¶ 9). This
5 Deed of Trust is junior in priority to a first priority deed of trust under which defendant Mortgage
6 Electronic Registration Systems, Inc., is the beneficiary of record.

7 Foreclosurelink contacted First American concerning a potential nonjudicial foreclosure of
8 the Subject Property when Foreclosurelink was contacted by Norm Pomeranz, an agent acting on
9 behalf of Tom Block. Mr. Block was the beneficiary by assignment of the Deed of Trust. First
10 American agreed to serve as the successor trustee under the Deed of Trust for purposes of
11 commencing a nonjudicial foreclosure. Accordingly, Mr. Block executed an Appointment of
12 Successor Trustee on January 4, 2007, appointing First American as the successor trustee. The form
13 of the Appointment of Successor Trustee was previously approved by First American, including the
14 request to return it after recording to Foreclosurelink. A true and correct copy of the Appointment
15 of Successor Trustee is attached to the supporting affidavits as Exhibit A. (First Am. Aff., ¶ 12,
16 Foreclosurelink Aff., ¶ 9).

17 Foreclosurelink subsequently prepared a Notice of Default also dated January 4, 2007, and
18 sent the Notice of Default to Plaintiff and the other parties entitled to notice by first class mail and
19 certified mail, pursuant to the provisions of the Revised Code of Washington 61.24.030(7). The
20 form of the Notice of Default was previously approved by First American, as well as Foreclosurelink
21 mailing the notices. The information for the mailing of the Notice of Default came from the trustee's
22 sale guarantee prepared by First American. The Notice of Default was also posted in a conspicuous
23 place on the Subject Property. (First Am. Aff., ¶ 13, Foreclosurelink Aff., ¶ 10).

24 On February 8, 2007, Foreclosurelink prepared a Notice of Foreclosure and a separate Notice
25 of Trustee's Sale, sending both notices to Plaintiff and the other parties entitled to receive notice by
26 first class mail and certified mail. The Notice of Foreclosure specified the office address of First
27 American in Seattle as the office to serve any process. The Notice of Trustee's Sale was recorded
28 in the Official Records of King County on February 9, 2007. Both the Notice of Foreclosure and

1 Notice of Trustee's Sale were in a form previously approved by First American, and the information
2 for the mailing of the notices came from the trustee's sale guarantee prepared by First American.
3 The Notice of Trustee's Sale was also published in the Daily Journal of Commerce and posted on
4 the Subject Property. (First Am. Aff., ¶ 14, Foreclosurelink Aff., ¶ 11).

5 On April 24, 2007, at the request of Mr. Block, a Notice of Discontinuance of the Trustee's
6 Sale was prepared by Foreclosurelink and recorded on April 26, 2007. The form of the Notice of
7 Discontinuance was previously approved by First American. (First Am. Aff., ¶ 15, Foreclosurelink
8 Aff., ¶ 12).

9 On October 24, 2007, Norm Pomeranz, the agent for Mr. Block, request the initiation of a
10 new nonjudicial foreclosure process due to a default by the Plaintiff. Foreclosurelink subsequently
11 prepared a Notice of Default dated October 30, 2007, and sent the Notice of Default to Plaintiff and
12 the other parties entitled to notice by first class mail and certified mail, pursuant to the provisions
13 of the Revised Code of Washington 61.24.030(7). The form of the Notice of Default was previously
14 approved by First American, as well as Foreclosurelink mailing the notices. The information for the
15 mailing of the Notice of Default came from the trustee's sale guarantee prepared by First American.
16 The Notice of Default was also posted in a conspicuous place on the Subject Property. A true and
17 correct copy of the Notice of Default is attached to the supporting affidavits as Exhibit B. (First Am.
18 Aff., ¶ 16, Foreclosurelink Aff., ¶ 13).

19 On November 30, 2007, Foreclosurelink prepared a Notice of Foreclosure and a separate
20 Notice of Trustee's Sale, sending both notices to Plaintiff and the other parties entitled to receive
21 notice by first class mail and certified mail. The Notice of Foreclosure specified the office address
22 of First American in Seattle as the office to serve any process. The Notice of Trustee's Sale was
23 recorded in the Official Records of King County on December 4, 2007. Both the Notice of
24 Foreclosure and Notice of Trustee's Sale were in a form previously approved by First American, and
25 the information for the mailing of the notices came from the trustee's sale guarantee prepared by
26 First American. The Notice of Trustee's Sale was also published in the Daily Journal of Commerce
27 and posted on the Subject Property. True and correct copies of the Notice of Foreclosure and Notice
28 of Trustee's Sale are attached to the supporting affidavits as Exhibits C and D, respectively. (First

1 Am. Aff., ¶ 17, Foreclosurelink Aff., ¶ 14). First American did not proceed with a sale due to the
 2 present litigation and communication with Mr. Block. (First Am. Aff., ¶ 18, Foreclosurelink Aff.,
 3 ¶ 15).

4 The use of agents to assist in the preparation and delivery of nonjudicial foreclosure notices
 5 is common for nonjudicial foreclosures processed within the State of Washington. The handling of
 6 the nonjudicial foreclosure notices as agent for First American in this matter is consistent with both
 7 First American and Foreclosurelink's procedures generally. (First Am. Aff., ¶ 19, Foreclosurelink
 8 Aff., ¶ 16).

9 The Plaintiff originally filed the present litigation in the Superior Court for the County of
 10 King. The operative complaint was the First Amended Complaint ("FAC") when the case was
 11 removed to Federal Court. The Plaintiff subsequently entered into a settlement with Defendant Tom
 12 Block, the beneficiary under the Deed of Trust who appointed First American as the successor
 13 trustee. The Plaintiff and Mr. Block reach an agreement on payment of the loan that had been in
 14 default. (See Discovery Responses by Plaintiff, attached as Exhibit A to the Affidavit of Peter
 15 Salmon.) A Notice of Discontinuance of Sale was recorded by First American based upon this
 16 settlement on July 3, 2008, as instrument number 20080703001010 in the official records of King
 17 County, Washington. (A true and correct copy of the Notice is attached as Exhibit A to the Request
 18 for Judicial Notice.)

19 **III. LEGAL STANDARD**

20 Summary judgment is appropriate where "the pleadings, the discovery and disclosure
 21 materials on file, and any affidavits show that there is no genuine issue as to any material fact and
 22 that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party
 23 is entitled to summary judgment if, after satisfying its initial burden, the non-moving party fails to
 24 present specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477
 25 U.S. 317, 324 (1986), cert. denied, 484 U.S. 1066 (1988). "The mere existence of a scintilla of
 26 evidence in support of the non-moving party's position is not sufficient" to defeat a motion for
 27 summary judgment. Triton Energy Corp. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). Factual
 28 disputes whose resolution would not affect the outcome of the litigation are irrelevant to the

1 consideration of a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
 2 248 (1986). Viewed another way, summary judgment is appropriate where the nonmoving party fails
 3 to present admissible evidence as to each and every essential element of their claim. Celotex, 477
 4 U.S. at 324; see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990) (failure to "make a
 5 sufficient showing of an essential element" of one's case requires dismissal). Mere disagreement or
 6 the bald assertion that a genuine issue of material fact exists will not preclude the use of summary
 7 judgment. California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466,
 8 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988).

9 **IV. THE REVISED CODE OF WASHINGTON GOVERNING NONJUDICIAL**
 10 **FORECLOSURE TRUSTEES PERMITS THE USE OF AGENTS AND THE SCOPE**
 11 **OF THE AGENCY BETWEEN FIRST AMERICAN AND FORECLOSURELINK**

12 The entirety of Plaintiff's claims against First American and Foreclosurelink are premised
 13 upon the contention that Foreclosurelink is actually acting as the nonjudicial foreclosure trustee
 14 under the Deed of Trust at issue even though it does not qualify to serve under RCW 61.24.010, and
 15 that even if First American sought the assistance of an agent to assist with foreclosure notices, the
 16 agent must qualify as a "title insurance agent" within the meaning of RCW 48.17.010(5). As set
 17 forth herein, these arguments are fundamentally flawed and mis-state Washington law.

18 A. The Applicable Washington Nonjudicial Foreclosure Statutory Authority Permits the
 19 Use of an Agent by the Trustee

20 No portion of the Revised Code of Washington governing nonjudicial foreclosures bars the
 21 use of agents to assist with the delivery of notices. Indeed, the statutory scheme governing the
 22 Notice of Sale expressly contemplates the use of an agent for the conduct of the sale and implicitly
 23 authorizes the use of agents for other notices.

24 Specifically, RCW 61.24.040(4) provides that "the trustee or its authorized agent shall sell
 25 the property at public auction." Therefore, the individual or entity that serves as the trustee does not
 26 have to personally conduct the sale. The Washington Supreme Court has specifically found that an
 27 agent engaged to conduct the actual sale can create liability for the nonjudicial foreclosure trustee
 28 even where that auctioneer was argued not to have apparent authority to open bidding at an

1 insufficient amount. See Udall v. T.D. Services, 159 Wash.2d 903, 912 (Wash.2007). The Udall
 2 Court analyzed the scope of the agency relationship between the trustee and the auctioneer it utilized
 3 under general principles of agency law as applied by Washington courts.

4 The other portions of RCW 61.24.040 also contemplate the use of agents for notices by
 5 utilizing the word “cause” to describe the obligations imposed on the trustee. For example,
 6 subdivision (3) provides that the trustee shall “cause” the notice of sale to be published; subdivisions
 7 (1)(b) through (f) provide that the trustee shall “cause” the notice of sale to be mailed to the required
 8 persons. If the Washington legislature intended that the trustee personally deliver each of those
 9 notices, it could have simply barred the use of agents to assist with delivery of required notices or
 10 would not have utilized the terminology “cause” to be mailed, and instead would have required the
 11 trustee to mail or publish the notices personally. It did not choose to do this; rather, the practice of
 12 utilizing agents for nonjudicial foreclosures in Washington is common for First American as a
 13 trustee and Foreclosurelink as an agent. Courts in other jurisdictions have also recognized this
 14 practice as common and accepted. See Russell v. Lundberg, 120 P.3d 541, 544 (Utah.App.2005).

15 First American, as a Washington licensed title insurance company authorized to serve as a
 16 trustee under RCW 61.24.010(1), has approved the form of the Notice of Default, Notice of
 17 Foreclosure, and Notice of Trustee’s Sale utilized in this foreclosure and in others. (First Am. Aff.,
 18 ¶ 8). It has also internally verified that these notices meet the requirements of the Revised Code of
 19 Washington. It specifies an actual office address in the State of Washington in the Notice of
 20 Foreclosure that any borrower or party in interest can contact in connection with a nonjudicial
 21 foreclosure. (First Am. Aff., ¶¶ 7, 14, 17). Foreclosurelink performs its duties in accordance with
 22 the agreement between First American and Foreclosurelink, and the affidavits of First American and
 23 Foreclosurelink show that all of the activity with regard to the present foreclosure demonstrates
 24 compliance with that agreement. As a result, the Plaintiff simply cannot demonstrate any conduct
 25 or action by either First American or Foreclosurelink that violates RCW 61.24.005 *et seq.*

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B. Plaintiff's Contention that an Agent for a Nonjudicial Foreclosure Trustee must be Licensed as a Title Insurance Agent Misapprehends Washington Nonjudicial Foreclosure Law and Relies on a Statute Not in Effect

The contention that Foreclosurelink must qualify as a "title insurance agent" in order to serve as an agent for First American for purposes of nonjudicial foreclosure notices is a flawed premise for multiple reasons. First, RCW 48.17.010 subdivision (15) cited by Plaintiff at paragraph 2.12 of the FAC does not even come into effect until July 1, 2009, and therefore cannot provide a legal basis for Plaintiff's assertion. Even if that definition applied to the case at bar, it fails to establish any violation of the nonjudicial foreclosure statutory scheme by either First American or Foreclosurelink.

Under the current version of RCW 48.17.010, an "Agent" means "any person appointed by an insurer to solicit applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated." However, Title 48 of the Revised Code of Washington has a section entitled "Scope of code" providing that "All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code." No portion of this Title of the Revised Code of Washington even purports to regulate the conduct of nonjudicial foreclosure sales.

Indeed, the Washington Supreme Court has noted that the nonjudicial foreclosure statutory scheme was created to provide a more efficient remedy for creditors coupled with the waiver of the right to pursue a deficiency associated with a judicial foreclosure action. The three goals of the Washington deed of trust act are: (1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles. Cox v. Helenius, 103 Wash.2d 383, 387 (1985). This comprehensive statutory scheme governs the entirety of the nonjudicial foreclosure process. The Plaintiff's attempt to utilize another statutory scheme to define who can serve as an agent also violates the settled principle of Washington law that the more specific statute governs over the more general. See Waste Management of Seattle, Inc. v. Utilities & Transp Comm'n, 123 Wash.2d 621, 630 (Wash.1994).

RCW 61.24.010(1) identifies what types of persons or entities who can qualify as a trustee for a nonjudicial foreclosure; a title insurance agency is one type of qualified person or entity. However, no portion of the remainder of this statutory section requires that an agent for the trustee qualify as a title insurance agent. The fallacy of the Plaintiff's reasoning becomes apparent when one considers RCW 61.24.010(4), which provides that the trustee or its authorized agent shall cause the sale to proceed. That subdivision does not require the agent for the trustee to have the same characteristics of the trustee in order to qualify as an agent. Otherwise, a trustee who qualified under RCW 61.24.010(1)(a) could only use an auctioneer that was also a "domestic corporation incorporated under Title 23B, 30, 31, 32, or 33 RCW of which at least one officer is a Washington resident"; or a trustee who qualifies because he or she is an attorney under RCW 61.24.010(1)(c) could only have an attorney conduct the actual auction. This proposition simply lacks statutory support or a common sense basis.

Consequently, the theory that First American and Foreclosurelink violated Washington law through their agency arrangement and actual conduct in this matter has no legal or factual support. Accordingly, the Plaintiff cannot prevail on any cause of action against either of these defendants, warranting an order granting summary judgment, or alternatively, summary adjudication on the specific causes of action discussed herein.

V. ARGUMENT – SUMMARY JUDGMENT IS WARRANTED ON EACH CLAIM

First American and Foreclosurelink are entitled to summary judgment, or alternatively summary adjudication, on each cause of action asserted by Plaintiff against them: Infliction of Emotional Distress; Slander of Title; Breach of Fiduciary Duty/Quasi-Fiduciary Duty; Violation of the Consumer Protection Act; and, Injunction. Neither First American nor Foreclosurelink are parties to the Plaintiff's cause of action for alleged violation of the Real Estate Settlement Procedures Act, and therefore do not address that cause of action.

A. Infliction of Emotional Distress:

First American and Foreclosurelink are entitled to summary judgment on this cause of action because Plaintiff cannot establish any of the elements of the claim. In his First Amended Complaint, the Plaintiff characterizes this cause of action as based upon Outrage or Intentional Infliction of

1 Emotional Distress. However, the Washington Supreme Court has held that outrage and intentional
2 infliction of emotional distress are synonyms for the same tort. Kloepfel v. Bokor, 149 Wash.2d
3 192, 194 (Wash.2003).

4 The tort of outrage requires the proof of: (1) extreme and outrageous conduct, (2) intentional
5 or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional
6 distress. Kloepfel at 194. These elements were adopted by the Washington Supreme Court in
7 Grimsby v. Samson, 85 Wash.2d 52, 59-60 (Wash.1975). Grimsby held any claim for intentional
8 infliction of emotional distress must be predicated on behavior “so outrageous in character, and so
9 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious,
10 and utterly intolerable in a civilized community.” Id. at 59. That must be conduct “which the
11 recitation of the facts to an average member of the community would arouse his resentment against
12 the actor and lead him to exclaim “Outrageous!” Id. Consequently, the tort of outrage “does not
13 extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” Id.

14 Plaintiff admits at paragraph 2.7 of the FAC that he defaulted in payments under the loan
15 with Block. He further acknowledged his default under the loan in his Settlement Agreement with
16 Mr. Block. Plaintiff’s only allegations as to First American and Foreclosurelink are that First
17 American is not properly appointed as a trustee and that its arrangement with Foreclosurelink
18 exceeds the permissible delegation of tasks by a trustee to an agent.

19 Further, notwithstanding the manner in which Plaintiff tries to characterize the alleged
20 impropriety of the agency relationship between Foreclosurelink and First American, it does not
21 constitutes extreme and outrageous conduct or intentional or reckless infliction of emotional distress.
22 Instead, the most the Plaintiff can challenge is the scope of the permissible delegation of duties under
23 RCW 61.24.005 *et seq* by a properly appointed trustee to an agent. Whether or not Plaintiff agrees
24 with what Washington law permits, he cannot establish a claim for Infliction of Emotional Distress,
25 and First American and Foreclosurelink are entitled to summary judgment on this claim.

26 B. Slander of Title:

27 The necessary elements of a slander of title action are that the words must: (1) be false; (2)
28 be maliciously published; (3) be spoken with reference to some pending sale or purchase of the

1 property; (4) result in a pecuniary loss or injury to the plaintiff; and (5) be such as to defeat the
 2 plaintiff's title. Brown v. Safeway Stores, Inc., 94 Wash.2d 359, 375 (Wash.1980). Plaintiff cannot
 3 establish the first, second, fourth, or fifth elements of the cause of action.

4 First, the Plaintiff has admitted the existence of a default in payments, and cannot now
 5 repudiate that admission to assert damage through the recording of nonjudicial foreclosure notices.
 6 Second, Plaintiff cannot establish malicious publication. "Malice is not present where the allegedly
 7 slanderous statements were made in good faith and were prompted by a reasonable belief in their
 8 veracity." Brown at 375. In Brown, an action was initiated against Safeway for an alleged breach
 9 of a written lease. Safeway claimed the action constituted slander of title precluding a proposed
 10 sublease to a third party. Id. at 363. The court held "[t]he initiation of litigation to determine the
 11 rights of the respective parties to a lease cannot, without more, be characterized as malicious
 12 conduct." Id. at 375. Likewise, the initiation of foreclosure proceedings cannot be deemed malicious
 13 in the context of a bona fide dispute over mortgage payments. See Hulse v. Owen Fed. Bank, FSB,
 14 195 F.Supp.2d 1188, 1208 (D.Or.2002). Plaintiff's claims against First American and
 15 Foreclosurelink simply relate to the permissible scope of the agency, which the Court can resolve
 16 based upon the arguments in section IV. supra. None of the conduct by First American or
 17 Foreclosurelink can be characterized as lacking in good faith.

18 As to the fourth and fifth elements of the cause of action, Plaintiff has not alleged that he lost
 19 title to the property at issue. Indeed, he reached a settlement with Mr. Block regarding the Deed of
 20 Trust on which First American is the substituted trustee. Therefore, his title has not been defeated,
 21 and he has admitted a default in payments that precludes him from claiming some pecuniary injury
 22 resulting from the initiation of nonjudicial foreclosure. As a result, the Court must grant summary
 23 judgment in favor of First American and Foreclosurelink.

24 C. Breach of Fiduciary Duty:

25 The Washington Supreme has noted that "a trustee of a deed of trust is a fiduciary for both
 26 the mortgagee and the mortgagor and must act impartially between them." Cox v. Helenius, 103
 27 Wash.2d 383, 389 (Wash.1985). However, the Cox Court emphasized that "Washington courts do
 28 not require a trustee to make sure that a grantor is protecting his or her own interest." Id. at 389.

1 Nevertheless, Plaintiff attempts to place this very duty on the Defendant. In *Cox*, the breach of
 2 fiduciary duty claim arose out of an actual conflict of interest of the trustee and the mortgagors. *Id.*
 3 at 385. In that case, the trustee was also the attorney for the beneficiary under a deed of trust.
 4 Plaintiffs sued the beneficiary for damages and reconveyance of the deed based on the beneficiary's
 5 failure to repair piping after the installation of a swimming pool. *Id.* The trustee at all relevant times
 6 was aware of the Plaintiffs' action and that the Plaintiffs believed their action halted the beneficiary's
 7 foreclosure sale when, in fact, it did not. *Id.* Despite settlement discussions with the plaintiffs'
 8 attorney almost two months before the foreclosure sale, the trustee held the sale collecting \$11,783
 9 on property worth between \$200,000 and \$300,000. *Id.*

10 Unlike the trustee in the *Cox* case, Defendant here never engaged in a course of conduct that
 11 could reasonably be construed as instilling a sense of reliance in the Plaintiff. Instead, the
 12 undisputed facts show that First American, with the assistance of Foreclosurelink, delivered all of
 13 the nonjudicial foreclosure notices required under Washington law and recorded discontinuances of
 14 each Notice of Trustee's Sale when requested by the beneficiary. Once again, the Plaintiff's only
 15 assertion as to these defendants relates to the permissible scope of the agency. First American and
 16 Foreclosurelink have already established their entitlement to prevail on this issue. As a result, these
 17 defendants are entitled to summary judgment on this cause of action.

18 D. Violation of the Consumer Protection Act:

19 Pursuant to section 19.86.020, "[u]nfair methods of competition and unfair or deceptive acts
 20 or practices in the conduct of any trade or commerce are hereby declared unlawful." In order to
 21 establish a violation of section 19.86.020, a plaintiff must prove "(1) an unfair or deceptive act or
 22 practice, (2) occurring in the conduct of trade or commerce, (3) that impacts the public interest, and
 23 (4) proximately causes injury to the plaintiff in his or her business or property." Johnson v. Cash
 24 Store, 116 Wash.App. 833, 846 (Wash.App.2003). Here, the Plaintiffs cannot establish the first or
 25 fourth element of a CPA violation.

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1 **1. The Agency Relationship Between First American and Foreclosurelink**
 2 **is Appropriate**

3 The Supreme Court of Washington has held that “[t]o show a party has engaged in an unfair
 4 or deceptive act or practice a plaintiff need not show that the act in question was intended to deceive,
 5 but that the alleged act has the capacity to deceive a substantial portion of the public.” *Sing v. John*
 6 *L. Scott, Inc.* (1997) 948 P.2d 816, 819. Moreover, “[w]hether a particular act or practice gives rise
 7 to a CPA violation is a question of law.” *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86
 8 Wash.App. 732, 743-44 (Wash.App.1997).

9 As set forth in section IV. supra, Washington law does not bar the use of an agent by a
 10 nonjudicial foreclosure trustee under a deed of trust for purposes of delivery of nonjudicial
 11 foreclosure notices. Further, the Appointment of Successor Trustee identifies First American as the
 12 trustee, with First American authorized to serve as a trustee as a licensed Washington title insurer.
 13 The Notice of Foreclosure mailed with the Notice of Trustee’s Sale identifies the physical address
 14 of First American in Washington. All nonjudicial foreclosure notices were actually delivered in
 15 accordance with Title 61 of the Revised Code of Washington. As a result, Plaintiff cannot establish
 16 an unfair or deceptive practice by the actions of Foreclosurelink as the agent for First American.

17 **2. Plaintiff Did Not Suffer Damage as a Result of the Agency Relationship**
 18 **Between First American and Foreclosurelink**

19 The Plaintiff cannot establish that the allegedly deceptive practices by First American or
 20 Foreclosurelink cause him any damage. Damages are established only where the plaintiff can prove
 21 that she “relied upon a misrepresentation of fact. . .[that] induced the plaintiff to act or refrain from
 22 acting.” *Robinson v. Avis Rent-A-Car System, Inc.*, 106 Wash.App. 104, 112 (Wash.App.2001).
 23 Here, the Plaintiff did not dispute that he defaulted in payments on two different occasions, each of
 24 which gave rise to the commencement of nonjudicial foreclosure. Indeed, Plaintiff reached a
 25 settlement with Mr. Block after the second default under which he admitted a payment default and
 26 set terms to bring the loan current and continue payments. These admitted defaults preclude him
 27 from claiming some pecuniary injury resulting from the initiation of nonjudicial foreclosure by First
 28 American, and as he cannot establish any impropriety in the agency relationship based upon the

arguments in section IV. supra, First American and Foreclosurelink are entitled to summary judgment on this claim.

E. Injunction:

The Plaintiff's FAC included a separate cause of action for an injunction to enjoin the nonjudicial foreclosure sale that Mr. Block was pursuing through First American. The injunction was granted without opposition by Block, First American, or Foreclosurelink. Plaintiff has now reached a settlement with Mr. Block by which he admitted the default and agreed to terms of repayment. In conjunction with that settlement, First American caused the recording of a Notice of Discontinuance of Trustee's Sale. As a result, there exists no pending foreclosure process for the Plaintiff to enjoin, making the relief sought by this cause of action moot. The Court should therefore either grant summary judgment for First American and Foreclosurelink on it, or deem it moot and dismiss as a matter of law from the FAC.

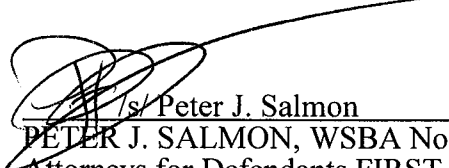
VI. CONCLUSION

Based upon the foregoing, First American and Foreclosurelink submit that they are entitled to an order for summary judgment as to the causes of action asserted against them by Plaintiff, or alternatively summary adjudication to the extent the Court finds summary judgment is not warranted. First American and Foreclosurelink request entry of an order granting summary judgment to them, for entry of a separate Judgment in their favor, and for such other and further relief as the Court deems proper.

Respectfully submitted,

Dated: March 30, 2009

PITE DUNCAN, LLP


 /s/ Peter J. Salmon
 PETER J. SALMON, WSBA No. 31382
 Attorneys for Defendants FIRST
 AMERICAN TITLE INSURANCE
 COMPANY AND FORECLOSURELINK,
 INC.

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